[ARGUMENT SCHEDULED ON APRIL 5, 2016]

No. 15-5250

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOHAMMED JAWAD also known as SAKI BACHA,

Plaintiff-Appellant,

v.

ROBERT M. GATES, former Secretary of Defense, *et al.*,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici.

Plaintiff-Appellant is Mohammed Jawad.

Defendants-Appellees are the United States of America; Ashton B. Carter (official capacity); Robert O. Work (official capacity); Raymond Mabus (official capacity); Joseph Dunford (official capacity); Kurt W. Tidd (official capacity); Peter J. Clarke (official capacity); David E. Heath (official capacity); John F. Campbell (official capacity); Kathleen H. Hawk (official capacity); Geoffrey D. Miller (individual capacity); Jay Hood (individual capacity); Nelson J. Cannon (individual capacity); and Esteban Rodriguez (individual capacity);

Defendants in the district court, named in Jawad's original complaint, also included Chuck Hagel; Robert M. Gates; Donald H. Rumsfeld; Paul Wolfowitz; Gordon R. England; John M. McHugh; Richard Myers; Peter Pace; James T. Hill; Bantz J. Craddock; James G. Stavridis; Daniel McNeill;

Frank Sweigart; James M. McGarrah; Harry B. Harris; Mark H. Buzby; David Thomas; Bruce Vargo; Wade Dennis; Michael Bumgarner; and Paul Rester.

Amicus Curiae in support of Mohammed Jawad is the John Marshall Law School International Human Rights Clinic.

B. Rulings Under Review.

The ruling under review is the decision of the United States District Court for the District of Columbia, Ellen Segal Huvelle, J., granting defendants' motions to dismiss, entered on July 8, 2015, 113 F. Supp. 3d 251, and reproduced in the Joint Appendix at 96-115; *see also id.* at 116 (separate order).

C. Related Cases.

I am aware of no related cases within the meaning of Circuit Rule 28. However, the district court previously granted Plaintiff-Appellant

Mohammed Jawad's petition for a writ of habeas corpus. *See Bacha v. Obama*, No. 05-2385, 2009 WL 2365846 (D.D.C. July 30, 2009).

s/ Lewis S. Yelin
LEWIS S. YELIN
Counsel for Appellees

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Cases

* Authorities on which we chiefly rely are marked with an asterisk.

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GLOSSARY

ARB	Administrative Review Board
AUMF	Authorization for Use of Military Force
ATS	Alien Tort Statute
CSRT	Combatant Status Review Tribunal
FTCA	Federal Tort Claims Act
MCA	Military Commissions Act
TVPA	Torture Victim Protection Act

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STATEMENT OF JURISDICTION

Appellant Mohammed Jawad asserted jurisdiction in the district court under the federal question statute, 28 U.S.C. § 1331, the Federal Tort Claims Act, 28 U.S.C. § 1346, the Alien Tort Statute, 28 U.S.C. § 1350, and the United States Constitution. JA 16. The district court granted the

federal defendants' motions to dismiss and entered final judgment on July 8, 2015. JA 96-115, 116. Jawad filed a notice of appeal on September 5, 2016, within the sixty-day period prescribed by Federal Rule of Appellate Procedure 4(a)(1)(B)(ii). JA 11. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the district court correctly held that Section 7(a) of the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified in relevant part at 28 U.S.C. § 2241(e)(2)), deprived the district court of jurisdiction over all of Jawad's damages claims against the United States and its agents;

2. Whether the district court correctly held that the United States was properly substituted for the individual defendants under the *Westfall* Act, 28 U.S.C. § 2679(b)(1), for Jawad's first three claims, and whether the district court properly dismissed those claims because the United States has not waived its sovereign immunity for such claims or, alternatively, because those claims are barred by the statute of limitations;

3. Whether the district court correctly dismissed Jawad's fourth cause of action for failure to state a claim because the Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992), does not create a right of action against federal officials acting under color of United States law; and

4. Whether the district court properly dismissed Jawad's fifth and sixth causes of action, asserted under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), because special factors counsel against the creation of a *Bivens* remedy for individuals formerly detained at the U.S. Naval Base in Guantanamo Bay, Cuba, or because the individual-capacity defendants enjoy qualified immunity.

PERTINENT STATUTES

Pertinent statutes are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

Appellant Mohammed Jawad, a former detainee at the U.S. Naval Base in Guantanamo Bay, Cuba, sued the United States and sixteen of its officials, four of whom he also sued in their individual capacities, seeking

damages for alleged mistreatment he suffered while he was detained by the United States in Afghanistan and Guantanamo.[1] Jawad's Amended Complaint for Damages (complaint) asserted claims under the Alien Tort Statute, the Federal Tort Claims Act, the Torture Victim Protection Act, and the Constitution. JA 17-23. By his designee, the Attorney General certified that the four officials sued in their individual capacities "were acting within the scope of their federal office or employment at the time of the incidents out of which [Jawad's] claims arose." JA 49. Pursuant to that certification and the *Westfall* Act, 28 U.S.C. § 2679(b)(1), the United States substituted itself for the individual-capacity defendants with respect to certain of Jawad's claims. JA 45-47. The United States and the individual defendants then moved to dismiss Jawad's complaint on a variety of grounds. JA 50-51; 64-65. Because it concluded that this Court's "precedent has already addressed [Jawad's] claims and rejected them," the

[1] All official-capacity defendants named in Jawad's complaint have left office. Pursuant to Federal Rule of Civil Procedure 25(d), their successors were automatically substituted as parties. In the addendum to this brief, we have identified the successor defendants-appellees.

district court granted the federal defendants' motions to dismiss. JA 96. Jawad now appeals. JA 11.

STATEMENT OF FACTS

I. STATUTORY BACKGROUND

A. Section 7(a) of the Military Commissions Act

In October 2006, Congress enacted the Military Commissions Act (MCA), Pub. L. No. 109-366, 120 Stat. 2600. Section 7(a) of that statute limits the jurisdiction of the federal courts to consider claims relating to the "treatment" or "conditions of confinement" of certain aliens. In relevant part, the statute provides:

> Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other [non-habeas] action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

28 U.S.C. § 2241(e)(2). That statute "withdraws the district court's jurisdiction over damages actions regarding any aspect of the detention of an alien previously determined by a [Combatant Status Review Tribunal]

to be properly detained as an enemy combatant." *Al Janko v. Gates*, 741 F.3d 136, 139 (D.C. Cir. 2014) (describing holding in *Al-Zahrani v. Rodriguez*, 669 F.3d 315, 318-19 (D.C. Cir. 2014)).

A separate provision of MCA Section 7(a) eliminated the courts' habeas jurisdiction over petitions filed by aliens determined by the United States to have been properly detained as an enemy combatant. *See* 28 U.S.C. § 2241(e)(1). In *Boumediene v. Bush*, 553 U.S. 723 (2008), the Supreme Court held that provision unconstitutional as applied to detainees held by the United States at the U.S. Naval Base in Guantanamo Bay. But this Court has held that *Boumediene*'s holding "does not affect the constitutionality of the [MCA] as applied in 'treatment' cases" pursuant to 28 U.S.C. § 2241(e)(2). *Al-Zahrani*, 669 F.3d at 319.

B. The *Westfall* Act

The Federal Tort Claims Act (FTCA) authorizes federal district courts to hear "civil actions on claims against the United States, for money damages" arising out of injuries "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the

scope of his office or employment," if a private person in like circumstances would face liability under state law. 28 U.S.C. § 1346(b)(1); *see generally* 28 U.S.C. §§ 1346(b), 2671-2680. The *Westfall* Act generally makes an FTCA action "exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim." 28 U.S.C. § 2679(b)(1) (enacted in response to *Westfall v. Erwin*, 484 U.S. 292 (1988)). But the *Westfall* Act does not provide immunity to a federal employee from a claim brought for a violation "of the Constitution of the United States" or "of a statute of the United States under which such action against an individual is otherwise authorized." 28 U.S.C. § 2679(b)(2)(A), (B).

If suit is brought against a government employee in his or her individual capacity, the *Westfall* Act authorizes the Attorney General to certify "that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose." 28 U.S.C. § 2679(d)(1). Upon such a certification, the suit "shall be deemed an action against the United States" under the FTCA, "and the

United States shall be substituted as the party defendant." *Id.* The Attorney General's certification "constitute[s] *prima facie* evidence that the employee was acting within the scope of his employment." *Wuterich v. Murtha*, 562 F.3d 375, 381 (D.C. Cir. 2009) (alteration in original). To rebut the certification, a plaintiff "must alleg[e] sufficient facts that, taken as true, would establish that the defendant['s] actions exceeded the scope of [his] employment." *Id*. (alterations in original; quotation marks omitted). If the plaintiff fails to meet that burden, "the United States must be substituted as the defendant because the federal employee is absolutely immune from suit." *Id*.

C. The Torture Victim Protection Act

The Torture Victim Protection Act of 1991 (TVPA) imposes liability on certain individuals for acts of torture and extrajudicial killing. The statute provides that "[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation * * * subjects an individual to torture shall, in a civil action, be liable for damages to that individual." Pub. L. No. 102-256, § 2(a)(1), 106 Stat. 73 (1992). The Act

does not apply to U.S. officials acting under U.S. law. Rather, in any suit against a federal official asserting a TVPA claim, a defendant must "clear the hurdle of showing that the individual [federal defendants]—who are of course *American* officials—acted 'under actual or apparent authority, or color of law, of any foreign nation.'" *Harbury v. Hayden*, 522 F.3d 413, 423 n.5 (D.C. Cir. 2008).

II. FACTUAL BACKGROUND

Jawad is an Afghan citizen who believes he was born in 1987.[2] JA 23, 24. On December 17, 2002, Afghan authorities apprehended Jawad following a hand grenade attack that badly injured two U.S. soldiers and an Afghan interpreter. JA 24. Jawad alleges that Afghan authorities abused him and forced him to sign (by his thumbprint) a confession admitting responsibility for the grenade attack. JA 24-25. The Afghan authorities gave the confession to U.S. officials, and then transferred Jawad

[2] Because the district court dismissed Jawad's complaint, the factual allegations made in Jawad's complaint are taken as true for purposes of this Court's review. *Brown v. Whole Foods Market Grp., Inc.*, 789 F.3d 146, 150 (D.C. Cir. 2015). The appellees do not concede Jawad's factual allegations for any other purpose.

to their custody. JA 25. Jawad further alleges that, "[d]espite his apparent status as a juvenile," the U.S. officials immediately interrogated him and subjected him to additional abuse. JA 26. While he initially denied knowledge of or responsibility for the attack, Jawad eventually confessed to participating in the attack. *Id*. On December 18, 2002, the U.S. authorities transferred Jawad to a detention facility at Bagram, Afghanistan, where he alleges he was subjected to further abuse. JA 27. Jawad subsequently recanted his confession and asserted his innocence. JA 28.

Around February 3, 2003, the U.S. officials transferred Jawad to the United States Naval Base at Guantanamo Bay, Cuba, where he states that he spent the majority of 2003 "in social, physical, and linguistic isolation." JA 28, 29. Jawad "was housed with the adult population rather than in separate facilities for juveniles." JA 29. Jawad attempted suicide on December 25, 2003. *Id*. By March 2004, Jawad claims, he "was deemed to be of no intelligence value to the U.S.," but he was nevertheless subject to over sixty interrogations until the time of his release. *Id*. Jawad claims that

U.S. authorities at Guantanamo subjected him to abuse, including a sleep-deprivation regime called the "frequent flyer" program. JA 29-30. In March 2004, the commanding officer ordered the discontinuation of the "frequent flyer" program "as an interrogation technique." JA 30. But he "did not order its use discontinued * * * as a method of controlling detainees." JA 31. U.S. officials subjected Jawad to the "frequent flyer" program from May 7 to May 20, 2004, during which time he suffered the physical effects of acute sleep deprivation. *Id*.

Jawad appeared before a Combatant Status Review Tribunal (CSRT), which, on November 4, 2004, determined him "to be an enemy combatant." JA 33. Jawad alleges that his enemy combatant status "was reaffirmed" by an Administrative Review Board (ARB) on December 8, 2005, and again on November 8, 2006.[3] *Id*. Jawad alleges that both the CSRT and the ARBs

[3] Administrative Review Boards were not established to review the propriety of CSRT determinations but "to assess annually the need to continue to detain each enemy combatant during the course of the current and ongoing hostilities." *Associated Press v. United States Dep't of Defense*, 554 F.3d 274, 279 n.1 (2d Cir. 2009); *see also Al Janko*, 741 F.3d at 138 n.2 ("[Administrative Review Boards] review whether a detainee should

"relied heavily" on the confessions Jawad made to Afghan and U.S. authorities in Afghanistan. *Id*.

On October 9, 2007, U.S. authorities charged Jawad under the Military Commissions Act of 2006 with three counts of attempted murder in violation of the law of war.[4] JA 34. The charges were referred to trial by military commission on January 30, 2008. *Id*. After military prosecutors expressed the government's intention to submit Jawad's confession to U.S. officials in Afghanistan as evidence of Jawad's involvement in the hand grenade attack, Jawad's counsel moved to suppress the statement as the product of torture. *Id*. The military commission granted Jawad's suppression motion. JA 34, 35. The military commission also found that subjecting Jawad to the "frequent flyer" program was "abusive conduct"

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remain detained based on an assessment of various factors, including the continued threat posed by each detainee." (quotation marks omitted)).

[4] U.S. authorities also charged Jawad with three counts of intentionally causing serious bodily injury, but those charges were later dismissed as lesser-included offenses. JA 34.

amounting to "cruel and inhuman treatment." JA 36 (quoting from commission ruling); *see* JA 67-72 (commission ruling).

Jawad filed a petition for a writ of habeas corpus in 2005 and an amended petition in 2009. JA 36. The United States initially opposed the petition and relied on Jawad's statements that had been suppressed by the military commission. *Id*. But in 2009, the United States filed a notice informing the district court that it will no longer treat Jawad as legally detainable. JA 37; *see* JA 81-85 (notice). That notice also did not oppose the entry of a writ of habeas corpus. JA 37; *see* JA 81-85 (notice). The district court granted Jawad's petition on July 30, 2009, and the United States subsequently repatriated Jawad. JA 37.

III. PRIOR PROCEEDINGS

A. Jawad's complaint asserts six claims against the United States and numerous federal officials. JA 37-44. The first three claims assert "a violation of international law under the [Alien Tort Statute (ATS)], 28 U.S.C. § 1350, and the [FTCA], 28 U.S.C. §§ 1346(b), 2671-2680," insofar as "Defendants tortured and inhumanely treated [Jawad]" in violation of:

"the law of the nations," JA 37; "the Third and Fourth Geneva Conventions," JA 38; and "Article 6 and Article 7 of the Optional Protocol on the Involvement of Child Soldiers in Armed Conflict," JA 40. The fourth claim asserts "a violation of the international law under the [ATS], 28 U.S.C. § 1350, and the [FTCA], 28 U.S.C. §§ 1346(b), 2671-2680," insofar as "Defendants unlawfully tortured [Jawad] in violation of the Torture Victim Protection Act." JA 40-41. The fifth and sixth claims assert violations of "the Due Process Clause of [the] Fifth Amendment to the U.S. Constitution" and the "Eighth Amendment of the U.S. Constitution," which Jawad alleged are actionable under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). JA 42-43. The complaint sought compensatory and punitive damages, attorney's fees, and costs. JA 44.

The Attorney General's delegated representative thereafter certified that the individual-capacity defendants "were acting within the scope of their federal office or employment at the time of the incidents out of which [Jawad's] claims arose." JA 49. The government then filed a notice

substituting the United States for the individual-capacity defendants with respect to Jawad's first three claims. JA 45-47.

The United States subsequently filed a motion to dismiss Jawad's first three claims, identifying multiple grounds for dismissal. JA 50-51. First, the motion argued that the MCA eliminates jurisdiction over all of Jawad's claims against the United States. Dkt. No. 28-1, at 20-23. Next, it argued that the United States has not waived its sovereign immunity concerning those claims because they arose in a foreign country, *id*. at 24-25 (citing 28 U.S.C. § 2680(k)), and because the FTCA does not waive the United States' sovereign immunity for violations of the international legal norms on which Jawad relied, *id*. at 25-26. The United States further argued that Jawad's claims under the FTCA were untimely and so barred by the applicable statute of limitations. *Id*. at 27-30.

The individual defendants also filed a motion to dismiss. JA 64-65. Like the United States, the individual defendants argued that all of Jawad's claims are barred by the MCA. Dkt. No. 29-1, at 10-11. The individual defendants also argued in the alternative that Jawad's fourth claim must be

dismissed for failure to state a claim because the TVPA does not authorize suits against U.S. officials acting under color of U.S. law, and that the constitutional claims must be dismissed because, under this Court's precedent, "special factors" precluded the recognition of a *Bivens* cause of action and the individual defendants are entitled to qualified immunity. *Id*. at 15-37. Finally, the individual defendants argued that the fifth and sixth claims must be dismissed because those claims were not filed within the applicable statute of limitations. *Id*. at 37-39.

B. "Because D.C. Circuit precedent has already addressed plaintiff's claims and rejected them," the district court granted the motions to dismiss. JA 96.

1. First, the district court held that the United States properly substituted itself for the individual defendants with respect to Jawad's first three claims and that those claims must be dismissed because the United States has not waived its sovereign immunity. JA 101-08.

The district court rejected Jawad's contention that the abuse he alleged was not within the scope of the U.S. officials' employment because

it was not "of the kind" the employees were expected to perform; it was not "actuated, at least in part, by a purpose to serve the master"; and the intentional use of force was "unexpectable by the master." JA 103 n.2 (quoting *Allaithi v. Rumsfeld*, 753 F.3d 1327, 1330 (D.C. Cir. 2014) (setting out scope-of-employment criteria)). The district court rejected Jawad's first argument because this Court has "consistently found that conduct similar to that alleged by [Jawad] fell within the scope of defendants' employment." JA 105 n.4 (citing *Allaithi*, 753 F.3d at 1332; *Ali v. Rumsfeld*, 649 F.3d 762, 765-66, 774-75 (D.C. Cir. 2011)). The court rejected Jawad's second argument because, although Jawad alleged that the abuse did not serve an intelligence-gathering purpose and that the frequent-flyer program had been prohibited as an interrogation technique, Jawad also alleged in his complaint that the frequent-flyer program was used "'as a form of punishment or "disincentive" for detainees, distinct from the interrogation process,'" JA 104 (quoting JA 30), and Jawad failed to allege facts that would show that the abuse was "*entirely* motivated by some sort of personal animus," JA 105 n.3 (quoting *Allaithi*, 753 F.3d at 1333). Finally,

the district court rejected Jawad's argument that the use of intentional force was unexpected because this Court repeatedly has held that the use of force like that Jawad alleged "was certainly foreseeable." JA 105 n.3 (quoting *Allaithi*, 753 F.3d at 1333); *see id*. n.4 (citing *Rasul v. Myers*, 512 F.3d 644, 660 (D.C. Cir. 2008), *vacated*, 555 U.S. 1083 (2008), *reinstated in relevant part on remand*, 563 F.3d 527 (D.C. Cir. 2009) (per curiam)).

Having determined that, under the *Westfall* Act, the United States was properly substituted for the individual defendants for Jawad's first three claims, the district court held that the United States has not waived its sovereign immunity for those claims. JA 107-08. The FTCA does not permit suit against the United States for "[a]ny claim arising in a foreign country." 28 U.S.C. § 2680(k). Jawad recognized that the district court previously had held that Guantanamo Bay is in a foreign country for purposes of the FTCA, but he asked the district court to reconsider its decision, in light of "the evolution of human rights law," and the fact that "only U.S. law applies" in Guantanamo. JA 107. The court rejected that request and dismissed Jawad's first three claims. JA 107-08.

2. Next, the district court dismissed Jawad's fourth cause of action, under the TVPA, for failure to state a claim. Noting that (as Jawad "appear[ed] to concede," JA 109) the plain terms of the TVPA apply only for torture conducted under "color of law" of "any foreign nation," § 2(a)(1), 106 Stat. at 73, the court rejected Jawad's argument that the TVPA's failure to extend liability to officials acting under U.S. law is "unconstitutional." The district court observed that, although Jawad "styles his argument as an objection to the constitutionality of the TVPA," he "in effect" asked the court to "rewrite that law to imply a new cause of action against U.S. officials," something the court could not do. JA 109.

3. The district court similarly dismissed Jawad's fifth and sixth causes of action, which asserted *Bivens* claims against the individual defendants. JA 110-11. The court noted that Jawad's "arguments are squarely foreclosed by Circuit precedent." JA 110. This Court has held that "special factors" counsel against the recognition of a *Bivens* remedy for Guantanamo detainees alleging mistreatment. *Id*. (citing *Allaithi*, 753 F.3d at 1334). Because Jawad "fail[ed] to address this binding Circuit law,

instead repeating arguments that have previously been rejected," the district court dismissed Jawad's remaining claims. JA 110-11.

4. The district court next held that the MCA requires dismissal of all of Jawad's claims. JA 111-14. Jawad argued that the MCA's jurisdictional limitation was not applicable to him because no CSRT determined him to be an "*unlawful* enemy combatant." JA 111. The district court held, however, that the MCA bars the adjudication of covered claims of detainees determined to be "enemy combatants," *id*.; *see* 28 U.S.C. § 2241(e)(2), and Jawad conceded that a CSRT determined that he had that status, JA 111-12. The district court similarly rejected Jawad's argument that the United States' decision not to contest Jawad's habeas petition made the MCA limitation inapplicable. JA 112-13. The district court explained that the government never conceded that Jawad was not an enemy combatant; the government's decision not to contest Jawad's habeas petition did not rescind the prior CSRT determination; and that prior determination triggered the bar "without regard to the determination's correctness." JA 113 (quoting *Al Janko*, 741 F.3d at 144. The district court

also rejected Jawad's contention that the MCA should not bar his claims because, under the "Child Soldier Protocol," the United States should never have taken custody of him. *Id*. Even if that were true, the district court noted, Jawad "has not explained why his juvenile status should negate the effect of 28 U.S.C. § 2241(e)(2)." *Id*.

Finally, the district court rejected Jawad's constitutional challenges to the MCA's jurisdictional limitation. This Court's decision in *Al-Zahrani*, *supra*, foreclosed Jawad's contention that the bar violates Article III of the Constitution. JA 113. And this Court's decisions recognizing Congress's authority to limit the courts' jurisdiction based on the existence of CSRT determinations foreclosed Jawad's argument that the MCA's jurisdictional limitation is unconstitutional because the CSRT proceedings themselves violate due process. JA 113-14 (citing *Al Janko*, 741 F.3d at 145-47; *Al-Zahrani*, 669 F.3d at 319-20). Finally, the district court agreed with the Fourth and Ninth Circuits' determinations that Section 2241(e)(2) is not a bill of attainder. JA 114 (citing *Ameur v. Gates*, 759 F.3d 317, 329 (4th Cir. 2014); *Hamad v. Gates*, 732 F.3d 990, 1004 (9th Cir. 2013)).

SUMMARY OF ARGUMENT

I. This Court should affirm the district court's judgment dismissing Jawad's claims because MCA Section 7(a) eliminates the courts' jurisdiction "to hear or consider any * * * [non-habeas] action against the United States or its agents relating" to the "treatment" or "conditions of confinement" of any "alien" detained by the United States and "determined by the United States to have been properly detained as an enemy combatant." 28 U.S.C. § 2241(e)(2). Each of the claims in Jawad's complaint "rather plainly" comes within that jurisdictional bar. *Al-Zahrani v. Rodriguez*, 669 F.3d 315, 319 (D.C. Cir. 2012). Accordingly, MCA Section 7(a) "requires that [this Court] affirm the dismissal of the action." *Id*.

Jawad's contrary arguments are waived or lack merit. Jawad argues that the MCA, including its jurisdictional bar, does not apply to juveniles. Br. 12. But that is an argument Jawad failed to make in the district court, so it is waived. The argument also lacks merit. Jawad notes that an international convention to which the United States is a party requires member states to reintegrate juvenile soldiers. Br.16. And he appears to

argue that the detention of a juvenile as an enemy combatant always violates that convention. Br. 15-16. For that reason, he argues, the MCA should not be interpreted to preclude his suit. *Id*. But even if Jawad's interpretation of the convention were correct, that says nothing about whether Congress, in the MCA, foreclosed damages actions. And, in any event, Jawad's belief that the treaty always precludes the detention of juveniles is inconsistent with the Executive Branch's interpretation of the convention and that of the United Nations body that monitors the treaty's implementation.

Jawad next argues that the MCA does not authorize military commissions to criminally try juveniles and, for that reason, the MCA's jurisdictional bar does not apply to juveniles. Br. 16-20. That, however, is simply another version of an argument this Court already has rejected: that the MCA's jurisdictional bar applies only to persons who are *properly* detained as enemy combatants. *See Al Janko v. Gates*, 741 F.3d 136, 144 (D.C. Cir. 2014). Instead, the jurisdictional bar is triggered when the

Executive Branch determines that the alien's detention is authorized, "without regard to the determination's correctness." *Id*.

Jawad further argues that the jurisdictional bar applies only to persons whom the United States has determined to be *unlawful* enemy combatants. Br. 21-25. Because the United States only determined him to be an "enemy combatant," Jawad contends, he is free to bring suit. *Id*. That argument lacks any merit. It is flatly inconsistent with the unambiguous language of MCA Section 7(a), which nowhere contains the qualifier "unlawful." And the argument is inconsistent with this Court's determination that what triggers the jurisdictional bar is a determination by the United States of an alien's "enemy-combatant status." *Al Janko*, 741 F.3d at 144. Moreover, Congress considered and rejected the very interpretation Jawad now presses.

Jawad's constitutional challenge to the MCA is plainly without merit. As this Court has recognized, Congress may preclude Guantanamo detainees from maintaining claims for money damages without running afoul of Article III. *See Al-Zahrani*, 669 F.3d at 319. That holding dooms

both Jawad's as-applied and facial constitutional challenges. Jawad's bill-of-attainder challenge also fails because Jawad makes no attempt to show that MCA Section 7(a) has the characteristics of a bill of attainder. *See* Br. 31.

II. Alternatively, this Court may affirm the district court's dismissal because Jawad's first three claims are not cognizable under the FTCA and because his remaining causes of action fail to state a claim.

Under this Court's precedent, there is no question that the United States properly substituted itself for the individual-capacity defendants as to Jawad's first three claims, because those defendants were acting within the scope of their employment. *See, e.g., Allaithi v. Rumsfeld*, 753 F.3d 1327, 1332 (D.C. Cir. 2014). Jawad's contention that the individual-capacity defendants were acting as rogue officials is inconsistent with Jawad's complaint, which alleged that the officials used the "frequent flyer" program for punishment and control in addition to intelligence gathering. JA 30-31.

Because the United States was properly substituted for the individual-capacity defendants, the district court properly dismissed Jawad's first three claims as not cognizable under the FTCA. That statute excludes from the United States' waiver of sovereign immunity "[a]ny claim arising in a foreign country." 28 U.S.C. § 2680(k). Even though the United States exercises "*de facto* sovereignty" over Guantanamo Bay, Cuba retains "legal and technical" sovereignty over that territory. *Boumediene v. Bush*, 553 U.S. 723, 754, 755 (2008). That is determinative for purposes of the FTCA's foreign-country exception, which applies to any "territory subject to the sovereignty of another nation." *United States v. Spelar*, 338 U.S. 217, 219 (1949). Jawad's first three claims are also barred because he did not file suit within the FTCA's six-month statute of limitations. 28 U.S.C. § 2401(b).

III. Jawad's fourth cause of action, asserted under the TVPA, fails to state a claim because that statute creates a right of action only against individuals acting under color of law "of any foreign nation." § 2(a)(1), 106 Stat. at 73. Jawad makes no attempt to demonstrate that the individual-

capacity defendants acted under color of foreign law. Instead, he invites the Court to extend the application of the statute to officials acting pursuant to U.S. law. Br. 54. But Jawad's contention that the Constitution required the district court to rewrite the statute to extend it to U.S. officials is plainly without merit.

IV. Finally, Jawad's constitutional claims are foreclosed by Circuit precedent. This Court has held that aliens detained in Afghanistan and Guantanamo could not bring damages actions challenging their treatment because such suits could interfere with the United States' significant national-security and foreign-policy interests. *See Ali v. Rumsfeld*, 649 F.3d 762, 765-66, 773-74 (D.C. Cir. 2011) (Afghanistan); *Allaithi*, 753 F.3d at 1332, 1334 (Guantanamo).

Jawad largely ignores that precedent. Instead, he reiterates the very arguments that this Court previously considered and rejected. Br. 44-50. And with respect to the only new arguments that he makes, Jawad provides no explanation as to why his juvenile status is relevant to the special-factors inquiry. Moreover, Jawad does not explain how the

international instruments he cites (which do not create judicially enforceable obligations, in any event), bear on the separate question of whether courts should recognize a claim for violation of a domestic constitutional right.

Even if special factors did not bar Jawad's fifth and sixth claims, Circuit precedent establishes that it was not clearly established that Jawad had any rights under the Fifth or Eighth Amendments when he was detained. *See Ali*, 649 F.3d at 771; *Rasul v. Myers*, 563 F.3d 527, 530 (D.C. Cir. 2009) (per curiam). Accordingly, the individual-capacity defendants enjoy qualified immunity from Jawad's fifth and sixth claims. *Rasul*, 563 F.3d at 529.

STANDARD OF REVIEW

This Court reviews de novo a district court's grant of a motion to dismiss for lack of subject-matter jurisdiction. *Al Janko v. Gates*, 741 F.3d 136 (D.C. Cir. 2014). The Court similarly reviews de novo a district court's dismissal for failure to state a claim. *Brown v. Whole Foods Mkt. Grp., Inc.*, 789 F.3d 146, 150 (D.C. Cir. 2015). Under such review, the Court treats "the

complaint's factual allegations as true" and gives the plaintiff "the benefit of all inferences that can be derived from the facts alleged." *Id*.

ARGUMENT

I. SECTION 7(a) OF THE MILITARY COMMISSIONS ACT DEPRIVED THE DISTRICT COURT OF JURISDICTION OVER JAWAD'S SUIT

A. The CSRT's Determination That Jawad Was Properly Detained as an Enemy Combatant Triggered the MCA's Jurisdictional Bar

Section 7(a) of the MCA provides that, except for review of CSRT enemy-combatant determinations and for review of final decisions of military commissions,

> no court, justice, or judge shall have jurisdiction to hear or consider any other [non-habeas] action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

28 U.S.C. § 2241(e)(2). Accepting the factual allegations in Jawad's complaint as true, each of the six claims in that complaint unambiguously is jurisdictionally barred by that provision. Plaintiff's suit is against agents of the United States and (through substitution under the *Westfall* Act)

against the United States itself. *See* JA 17-23 (identification of parties in complaint). The suit relates to various "aspect[s] of" the United States' "treatment" and "conditions of confinement" of Jawad. *See* JA 23-31 (alleging abuse while in U.S. custody); JA 37-44 (asserting six claims based on that alleged abuse). Jawad is an alien, JA 15 (alleging Afghan citizenship), who was detained by the United States, *see, e.g.*, JA 28-29 (describing transfer to Guantanamo Bay), and he "was determined to be an enemy combatant" by a CSRT, JA 33 (describing CSRT determination).

As in *Al-Zahrani*, the "present litigation rather plainly constitutes an action other than habeas corpus brought against the United States and its agents relating to 'aspect[s] of the detention . . . treatment . . . [and] conditions of confinement of an alien' as described in the MCA." *Al-Zahrani v. Rodriguez*, 669 F.3d 315, 319 (D.C. Cir. 2012).[5] Accordingly, the

[5] The Court referred to "an action other than habeas corpus" to distinguish 28 U.S.C. § 2241(e)(2), the provision of the MCA at issue in this litigation, from 28 U.S.C. § 2241(e)(1), a provision of the MCA eliminating jurisdiction over habeas actions of alien detainees determined to be enemy combatants. *Al-Zahrani*, 669 F.3d at 319. In *Boumediene v. Bush*, 553 U.S. 723 (2008), the Supreme Court held the MCA's habeas provision

district court lacked jurisdiction over the suit "by the 'plain language' of an Act of Congress." *Id.*; *see id.* ("This ends the litigation and requires that we affirm the dismissal of the action."); *see also Al Janko v. Gates*, 741 F.3d 136, 137 (D.C. Cir. 2014) (affirming district court's dismissal of suit under the MCA "[b]ecause the Congress has, in unmistakable language, denied the district court jurisdiction to entertain" the claims of a former Guantanamo detainee determined by a CSRT to be an enemy combatant).

B. Jawad's Contrary Arguments Are Waived or Lack Merit

Jawad's numerous arguments to the contrary (Br. 12-33) are insufficient to overcome the plain application of section 2241(e)(2).

1. Jawad's principal argument on appeal is that, because "the MCA is completely silent on the treatment of minors, its provisions do not apply to juveniles such as [Jawad]." Br. 12. Although Jawad now makes that

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unconstitutional as applied to detainees held by the United States at the U.S. Naval Base in Guantanamo Bay. But this Court repeatedly has held that *Boumediene*'s holding "does not affect the constitutionality of the [MCA] as applied in 'treatment' cases" pursuant to 28 U.S.C. § 2241(e)(2). *Al-Zahrani*, 669 F.3d at 319; *see Kiyemba v. Obama*, 561 F.3d 509, 512 n.1 (D.C. Cir. 2009).

argument in his opening brief in this Court (Br. 13-21), Jawad entirely failed to present it to the district court. In the district court, Jawad argued only that his juvenile status "taint[ed]" the CSRT enemy-combatant determination. *See* Dkt. No. 31, at 25-26. As the district court noted, however, Jawad did not explain[] why his juvenile status should negate the effect of 28 U.S.C. § 2241(e)(2)." JA 113.

"[A]bsent exceptional circumstances," this court considers "only those arguments that were made in the district court." *Potter v. District of Columbia*, 558 F.3d 542, 547 (D.C. Cir. 2009). Exceptional circumstances do not exist to excuse Jawad's failure to make this argument in the district court. *See United States v. Atkinson*, 297 U.S. 157, 160 (1936) (identifying as exceptional circumstances obvious errors or errors that "otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings"). Accordingly, Jawad has waived the argument that the MCA, including the statute's jurisdictional bar, does not apply to juveniles, and this Court "need not wade into these waters." *Schrader v. Holder*, 704 F.3d 980, 991 (D.C. Cir. 2013).

If the Court chooses to exercise its discretion to consider Jawad's waived argument, however, it should reject the argument as meritless. Jawad offers a two-pronged argument that (a) his detention was unlawful as a violation of the Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflict, July 5, 2000, S. Treaty Doc. No. 106-37 (2000) (Optional Protocol); and (b) the Military Commission lacked authority to prosecute him because of his status as a minor. But even if Jawad were correct in these assertions, they do not lead to the conclusion that the MCA's jurisdictional bar is inapplicable. Simply stated, any limitations on detention authority or the ability to try an individual for war crimes says nothing about whether Congress has foreclosed actions for damages, or about Congress' authority to do so.

Jawad argues (Br. 16) that "[d]etaining and subjecting a juvenile to a CSRT or the MCA is contrary to" Article 6(3) of the Optional Protocol. That provision requires member states to "take all feasible measures to ensure that persons within their jurisdiction recruited or used in hostilities contrary to the present Protocol are demobilized or otherwise released

from service." Optional Protocol, art. 6(3). It also requires member states "when necessary, [to] accord to such persons all appropriate assistance for their physical and psychological recovery and their social reintegration." *Id*.

Jawad appears to argue that any detention of a juvenile as an enemy combatant always violates Article 6(3), and that the MCA's silence as to juveniles should be understood in light of the Optional Protocol's prohibition. *See* Br. 15-16; *see* Br. 16 (arguing that "the MCA violates the Child Soldier Protocol * * * to the extent it authorizes the government to detain and prosecute minors"). But Jawad's understanding of Article 6(3) is incorrect. Article 6(3) requires states to take "feasible measures" to demobilize children within their jurisdiction who have been recruited or used in hostilities contrary to the Protocol. It does not prohibit states from detaining such individuals, pursuant to lawful authority. Moreover, neither the Executive Branch nor the United Nations Committee on the

Rights of the Child interpret Article 6(3) to prohibit detention.[6] *See, e.g.*, *Periodic Report of the United States of America and U.S. Response to Recommendations in Committee Concluding Observations of June 25, 2008* 46-47 (Jan. 22, 2010), http://go.usa.gov/cEJ3z (last visited Feb. 10, 2016) (reporting that the Department of Defense "has gone beyond the requirement of the Protocol" with respect to "juveniles captured on the battlefield and held in detention"); *id*. at 46 (Committee recommendation that the United States "[e]nsure that children are only detained as a measure of last resort"). Jawad has given no reason to question the Executive Branch's understanding of the Protocol's requirements. *See Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982) ("Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight.").

[6] The United Nations Committee on the Rights of the Child "monitors implementation of the Convention on the Rights of the Child" by the member states, as well as implementation of the optional protocol on the involvement of children in armed conflict. *Committee on the Rights of the Child*, http://goo.gl/TWPJMO (last visited Feb. 10, 2016).

Jawad next argues that military commissions authorized by the MCA to criminally try individuals for violations of the law of war "lack jurisdiction over minors below the age of consent." Br. 17; *see generally* Br. 16-19. Because "the MCA does not provide for jurisdiction over juveniles," he argues, "the MCA Section 7 statutory bar is also inapplicable to [Jawad] because any determination [that] he was 'detained as an enemy combatant' was improper due to his minor status." Br. 20. Jawad's argument is premised on the lack of jurisdiction in courts-marital to try minors for desertion from the U.S. military because "an individual under the age of 17 is statutorily incompetent to acquire military status." Br. 17 (quoting *United States v. Brown*, 48 C.M.R. 778, 780 (C.M.A. 1974)). The argument also relies on a federal statute providing for delinquency proceedings in federal courts. Br. 18 (discussing the Federal Juvenile Delinquency Act, 18 U.S.C. §§ 5031-5042). But those considerations have no bearing on the scope of the MCA, which Congress enacted for entirely different purposes. *See Al Bahlul v. United States*, 767 F.3d 1, 35 (D.C. Cir. 2014) ("Congress

enacted the [MCA] to authorize the establishment of law-of-war military commissions and to establish procedures governing their use.").

More fundamentally, Jawad's argument (Br. 20) that the MCA's jurisdictional bar does not apply to him because his detention "'as an enemy combatant' was improper due to his minor status," reduces to the contention that the MCA jurisdictional bar applies only to persons who a CSRT properly determined to be enemy combatants. *See also* Br. 25-26 (arguing that proceedings before the military commission "constitute a rescission of any alleged previous classification as an enemy combatant"); Br. 26-27 (arguing that the United States' decision to "no longer treat [Jawad] as detainable" (JA 81) shows that Jawad "could not have been properly detained" (Br. 26)). But this Court has already rejected precisely that argument: "[T]he statute does not say that the bar applies to an alien whom 'the United States has *properly* determined to have been properly detained as an enemy combatant.' It requires only that the Executive Branch determine that the [Authorization for Use of Military Force]

authorizes the alien's detention without regard to the determination's correctness." *Al Janko*, 741 F.3d at 144.

In any event, Jawad's arguments are irrelevant to the question of whether the MCA bars Jawad's action for damages related to his detention and treatment by the United States. The unambiguous text of Section 7(a) precludes Jawad's suit, and Jawad's arguments concerning the United States' obligations under the Optional Protocol or its authority to try juveniles before military commissions, even if correct, do not affect the MCA's jurisdictional bar.

2. Jawad argues that the MCA's jurisdictional bar does not apply to him because, while a CSRT determined Jawad "to be an enemy combatant" (JA 33; *see* Br. 24), the "plain and unambiguous" language (Br. 22) of 28 U.S.C. § 2241(e)(2) only deprives the courts of jurisdiction over claims asserted by aliens determined to be *unlawful* enemy combatants (Br. 21-25). That argument lacks any merit. The MCA's jurisdictional bar deprives the courts of jurisdiction over claims concerning the treatment of a detained alien who "has been determined by the United States to have been

properly detained as an enemy combatant." 28 U.S.C. § 2241(e)(2); *see Al-Zahrani*, 669 F.3d at 319 ("[T]he Act means what it says."). The qualifier "unlawful" appears nowhere in the statutory language.

Jawad nevertheless argues that the term "unlawful" must be read into the statute in light of the history and context of the MCA. Br. 22-25. He notes that before 2006, CSRTs determined only whether a detainee was an "enemy combatant," not whether the detainee was an unlawful enemy combatant. Br. 22; *see Khadr v. United States*, 529 F.3d 1112, 1114 (D.C. Cir. 2008) (recounting 2004 "enemy combatant" determination). That year, in a decision that produced no majority opinion, the Supreme Court held that Congress had not authorized the use of military commissions to try detainees for violations of the law of war. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). Congress reacted by enacting the MCA, which provided for jurisdiction over punishable offenses "committed by an alien unlawful enemy combatant." 10 U.S.C. § 948d(a) (2006). Because Congress authorized trial by military commission of only "unlawful" enemy combatants, Jawad argues, the qualifier "unlawful" must be read into the

jurisdictional bar in MCA Section 7. Br. 24; *see* Br. 25 ("MCA Section 7 may only bar claims by individuals over which the MCA has jurisdiction over.").

That argument is inconsistent with this Court's interpretation of 28 U.S.C. § 2241(e)(2). This Court has held that the term "enemy combatant" in that provision does not track the MCA's grant of jurisdiction to try "unlawful enemy combatants" but, instead, refers to an alien's status as an enemy combatant under the Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (2001). *See Al Janko*, 741 F.3d at 144 ("The phrase 'properly detained as an enemy combatant' identifies the type of determination the Executive Branch must make, *viz.*, a determination that the detainee meets the AUMF's criteria for enemy-combatant status."). Moreover, Jawad's interpretation invites this Court to violate its "duty to refrain from reading a phrase into the statute when Congress has left it out." *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993); *see Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits

it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (alteration in original).

The presumption that Congress intentionally omitted "unlawful" from the MCA's jurisdictional bar is supported by the history of the bill that became the MCA. The House version of the bill would have barred the courts' jurisdiction over "any claim or cause of action" by "any alien detained by the United States as an unlawful enemy combatant." Military Commissions Act of 2006, H.R. 6054, 109th Cong. § 5 (2006) (introduced in House). But the Senate version of the bill, which eventually was enacted, omitted the qualifier "unlawful," instead barring jurisdiction over the treatment claims of any alien "properly detained as an enemy combatant." Military Commissions Act of 2006, S. 3930, 109th Cong. § 7 (2006) (enrolled bill). Congress thus considered and rejected a provision that would have limited the jurisdictional bar to actions brought by unlawful enemy combatants. *See, e.g., Immigration and Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 443 (1987) ("Few principles of statutory construction are more

compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language."); *Doe v. Chao*, 540 U.S. 614, 622 (2004) (rejecting petitioner's interpretation of statute because the "drafting history show[ed] that Congress cut out the very language in the bill that would have" supported the interpretation petitioner urged).

The reason for Congress's decision to preclude jurisdiction over treatment claims by "enemy combatants" is not difficult to infer. The Detainee Treatment Act of 2005, enacted the year before the MCA, gave this Court "exclusive jurisdiction to determine the validity of any final decision of a [CSRT] that an alien is properly detained as an enemy combatant." Pub. L. No. 109-148, div. A, tit. X, § 1005(e)(2)(A), 119 Stat. 2742. "The language of the [Detainee Treatment Act], and the MCA's reference thereto in section 7(a), demonstrates that the Executive Branch's practice of using CSRTs to determine whether aliens detained at Guantanamo were 'properly detained as enemy combatants' was well known to the Congress when it enacted the MCA." *Al Janko*, 741 F.3d at

145. Congress's evident intent in the MCA of precluding jurisdiction over specified suits by "enemy combatants" was to preclude suit by any alien determined by a CSRT to be properly detained, regardless of whether that determination was made before or after the 2006 enactment of the MCA.

3. Jawad briefly argues (Br. 28-33) that the MCA's jurisdictional bar is facially unconstitutional under Article III and the Bill of Attainder Clause, and unconstitutional as applied to him because it would preclude his suit based on an erroneous CSRT determination. Those arguments are mistaken.

Jawad's contention that the MCA's jurisdictional bar is unconstitutional as applied to him because it denies him "recourse for * * * unconstitutional trespasses by the United States" (Br. 33) is foreclosed by this Court's decision in *Al-Zahrani*, 669 F.3d at 319 (holding that a damages remedy for alleged constitutional violation is not constitutionally required); *id.* (holding that *Boumediene* "does not affect the constitutionality of the [MCA] as applied in 'treatment' cases").

Al-Zahrani also forecloses Jawad's Article III facial challenge. In that case, the Court held that the MCA's jurisdictional bar is constitutional as applied to suits, such as this one, seeking money damages for alleged violations of constitutional rights. *Al-Zahrani*, 669 F.3d at 319 ("[S]uch remedies are not constitutionally required."); *see id*. at 320 (explaining that damages remedies constitutionally may be precluded "even in cases such as the present one, where damages are the sole remedy by which the rights of plaintiffs and their decedents might be vindicated"). In light of that holding, Jawad cannot possibly show that "no set of circumstances exists under which the [statute] would be valid." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008).

Jawad also asserts that the MCA's jurisdictional bar is facially unconstitutional because it is a bill of attainder, imposing legislative punishment on aliens detained as enemy combatants. Br. 31; *see* U.S. Const. art. I, § 9, cl. 3. To establish that a statute is a bill of attainder, a plaintiff must demonstrate that "the challenged statute falls within the historical meaning of legislative punishment"; that the statute, "viewed in

terms of the type and severity of burdens imposed," furthers no "nonpunitive legislative purposes"; and that the statute "evinces a congressional intent to punish." *Selective Serv. Sys. v. Minnesota Pub. Interest Research Grp.*, 468 U.S. 841, 852 (1984). Jawad makes no attempt to demonstrate that those conditions are satisfied, so his challenge necessarily fails. Moreover, the two courts of appeals to have considered the issue have concluded that the MCA's jurisdictional bar does not qualify as a bill of attainder. *See Ameur v. Gates*, 759 F.3d 317, 329 (4th Cir. 2014) ("Section 2241(e)(2) is not a bill of attainder."); *Hamad v. Gates*, 732 F.3d 990, 1004 (9th Cir. 2013) (same).

II. THE DISTRICT COURT ALSO LACKED JURISDICTION OVER JAWAD'S FIRST THREE CLAIMS UNDER THE *WESTFALL* ACT AND THE FEDERAL TORT CLAIMS ACT

Alternatively, this Court may affirm the district court's dismissal of Jawad's suit because Jawad's first three claims are not cognizable under the Federal Tort Claims Act, as we argue in this part, and his remaining causes of action fail to state a claim, as we demonstrate in Parts III and IV.

A. The United States Was Properly Substituted for the Individual-Capacity Defendants

The *Westfall* Act generally provides federal employees with absolute immunity from suit and requires substitution of the United States as the defendant in any action seeking damages for "personal injury * * * arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. § 2679(b)(1). In this case, the Attorney General's designee certified that the defendants sued in their individual capacities "were acting within the scope of their federal office or employment at the time of the incidents out of which [Jawad's] claims arose." JA 49. Accordingly, the United States substituted itself for the individual defendants with respect to Jawad's first three claims, JA 45, and the district court accepted that substitution, JA 101-07. Under the law of this Circuit, the district court's substitution decision was plainly correct.

Petitioner alleges that while he was detained by the United States, government officials subjected him to "starvation, sleep deprivation, blindfolding, hoodings, beatings, physical and linguistic isolation,

shackling, and threats to his life." Br. 9. In *Allaithi v. Rumsfeld*, this Court held that very similar, and in several respects identical, conduct alleged by a Guantanamo detainee—"disruption of * * * religious practices, solitary confinement, shackles and chains, blackened goggles, ear coverings, sleep deprivation, body searches, and forcible shaving"—came within the scope of the individual defendants' employment. 753 F.3d 1327, 1332 (D.C. Cir. 2014); *see Ali*, 649 F.3d at 774 (similar); *Rasul v. Myers*, 512 F.3d 644, 656-61 (D.C. Cir.) (similar), *vacated*, 555 U.S. 1083 (2008), *reinstated in relevant part on remand*, 563 F.3d 527 (D.C. Cir. 2009) (per curiam). This court's precedent thus directly governs the substitution issue.

Jawad argues, nevertheless, that the district court erred in permitting the United States to be substituted for the individual defendants. Br. 33-44. He contends that his treatment, and in particular the "frequent flyer" program, was the conduct of "rogue officials" that had no "intelligence gathering or disciplinary purpose." Br. 35; *see* Br. 37-38. Based on that premise, Jawad argues that the alleged conduct "fails the first, third and fourth prongs" of the applicable scope-of-employment test. Br. 38; *see*

Allaithi, 753 F.3d at 1330 (conduct within the scope of employment must (1) be "of the kind" the employee is expected to perform; (2) occur largely within authorized time and space limits; (3) be "actuated, at least in part, by a purpose to serve the master"; and (4) if intentional force is used, the use of force must not be "unexpectable by the master").

But Jawad's premise is flatly inconsistent with the factual allegations of his complaint. Jawad's complaint alleges that, "[a]ccording to testimony adduced at [Jawad's] military commission, the frequent flyer program was also used by [government officials] as a form of punishment or 'disincentive' for detainees, distinct from the interrogation process." JA 30. The complaint further alleges that although the program was "discontinued as an interrogation technique," the commanding officer "apparently did not order its use discontinued * * * as a method of controlling detainees." JA 30-31. *Allaithi* expressly held that alleged serious abuse by U.S. officials at Guantanamo employed for disciplinary purposes—including sleep-deprivation techniques—comes within the scope of the government officials' employment. 753 F.3d at 1331-34. That

decides the issue. Jawad also argues that the district court erred in accepting the United States' substitution because he "adequately alleged that the individual Defendants personally acted outside the scope of their employment." Br. 42. But that is a legal conclusion, not a factual allegation, which is not accepted as true for purposes of a motion to dismiss. *See Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002) (on review of a decision granting a motion to dismiss, the Court does not accept as true "legal conclusions cast in the form of factual allegations").

B. The United States' Sovereign Immunity Bars Jawad's First Three Claims

The district court properly concluded that Jawad's first three claims—asserting violations of the law of nations, the Third and Fourth Geneva Conventions, and the Optional Protocol on the Involvement of Child Soldiers in Armed Conflict—were converted into FTCA claims upon the substitution of the United States and are barred by the FTCA's foreign-country exception. JA 107-08.

The FTCA excludes from the United States' waiver of sovereign immunity "[a]ny claim arising in a foreign country." 28 U.S.C. § 2680(k).

In *United States v. Spelar*, the Supreme Court held that a military base in Newfoundland, Canada, that was leased to the United States by Great Britain was a "foreign country" for purposes of the FTCA. 338 U.S. 217 (1949). The Court explained that the answer "lies in the express words of the statute." *Id*. at 219. The key factor is whether the territory on which the claim arose is subject to another nation's sovereignty: "We know of no more accurate phrase in common English usage than 'foreign country' to denote territory subject to the sovereignty of another nation." *Id*. Because the lease "did not and w[as] not intended to transfer sovereignty over the leased areas from Great Britain to the United States," the Court held that the foreign-country exception applied to the base. *Id*.

Spelar directly controls.[7] The lease agreement governing Guantanamo provides that "the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the [leased

[7] Jawad apparently believes that this Court already "has held Guantanamo Bay is a foreign country under the FTCA." Br. 50. That is mistaken. Jawad does not appear to dispute that his claims are barred by the foreign-country exception to the extent they arise out of conduct occurring in Afghanistan. *See* Br. 50-53.

areas]." Lease of Lands for Coaling and Naval Stations, art. III, Feb. 23, 1903, U.S.–Cuba, T.S. No. 418. As the Supreme Court recognized in *Boumediene*, "Guantanamo Bay is not formally part of the United States," and "Cuba, not the United States, maintains sovereignty, in the legal and technical sense of the term, over Guantanamo Bay." 553 U.S. at 753-54. As in *Spelar*, Guantanamo is therefore a "foreign country" for purposes of the FTCA. *Cf. Broadnax v. United States Army*, 710 F.2d 865, 867 (D.C. Cir. 1983) (claim arising at a U.S. Army hospital in Germany comes within the FTCA's foreign-country exception).

Jawad appears to argue that the United States' *de facto* sovereignty over Guantanamo Bay removes that territory from the FTCA's foreign-country exception. Br. 51-52; *see Boumediene*, 553 U.S. at 754, 755 (recognizing that the United States exercises "*de facto* sovereignty" over Guantanamo Bay). But the test is *de jure*, not *de facto*, sovereignty. In *Spelar*, the Supreme Court held that the military base was in a foreign country for purposes of the FTCA, despite the fact that the United States exercised significant "territorial control" over the base. 338 U.S. at 223 (Frankfurter,

J., concurring). The extent of the United States' authority over Guantanamo Bay may be significantly greater than that exercised over the military base in Newfoundland, given the indefinite nature of the United States' lease of Guantanamo. *Cf. Boumediene*, 553 U.S. at 768-69 (discussing indefinite duration of lease). But that difference does not convert the United States' authority into *de jure* sovereignty. *See id*. at 754 ("We * * * do not question the Government's position that Cuba, not the United States, maintains sovereignty, in the legal and technical sense of the term, over Guantanamo Bay.").

The distinction is crucial: The FTCA subjects the United States to liability "in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b)(1). And in enacting the FTCA, Congress "was unwilling to subject the United States to liabilities depending upon the laws of a foreign power." *Spelar*, 338 U.S. at 217. Federal law cannot be "the source of substantive liability under the FTCA." *Federal Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 478 (1994). Because any tort action concerning conduct occurring at Guantanamo Bay would require the application of

Cuban law, the FTCA's foreign country exception precludes suit under that statute. *Cf. Spelar*, 338 U.S. at 221 (FTCA suit barred where suit would "depend[] upon the laws of a foreign power").

C. Alternatively, Jawad's First Three Claims Are Barred by the Statute of Limitations

The FTCA's statute of limitations provides that a tort action against the United States "shall be forever barred" unless it is presented to the "appropriate Federal agency within two years after such claim accrues" and then asserted in a suit filed "within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented." 28 U.S.C. § 2401(b). Jawad's complaint alleges that the Navy informed Jawad of its denial of his claims in a letter dated November 12, 2013. JA 16; *see* JA 59-60 (reproducing letter). The Navy, however, earlier sent a notice of its decision to Jawad's counsel by certified mail on October 10, 2013. *See* JA 53-54; *see also* JA 55-57 (proof of mailing). That original letter was returned to the Navy as undeliverable and not able to be forwarded. JA 56. Jawad filed suit more

than six months after the date of that first certified mailing. JA 5. His suit, therefore, is time barred.

Filing suit within the FTCA's statute of limitations is not a jurisdictional requirement. *United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1632-33 (2015). Accordingly, courts may equitably toll the statute of limitations "when a party has pursued his rights diligently but some extraordinary circumstance prevents him from meeting a deadline." *Id*. at 1630-31 (quotation marks omitted). In the district court, Jawad explained that his counsel "arrang[ed] for mail forwarding from his prior address." Dkt. No. 31, at 51; *id*. Ex. F (affidavit describing steps taken to forward mail from counsel's place of prior employment to place of counsel's current employment). But Jawad did not contend that his counsel informed the Navy of his change of address. *See* Dkt. No. 31, at 51. Under such circumstances, equitable tolling is not justified. *See, e.g., Maggio v. Wisconsin Ave. Psychiatric Ctr., Inc.*, 795 F.3d 57, 58-61 (D.C. Cir. 2015) (declining to equitably toll statute of limitations where plaintiff failed to provide agency with updated mailing address after he moved). This Court

may therefore affirm the district court's dismissal of Jawad's first three claims for failure to comply with the FTCA's statute of limitations.

III. JAWAD'S FOURTH CAUSE OF ACTION ALSO FAILED TO STATE A CLAIM UNDER THE TORTURE VICTIM PROTECTION ACT

In any suit asserting a TVPA claim against a federal official, a defendant must "clear the hurdle of showing that the individual [federal defendants]—who are of course *American* officials—acted 'under actual or apparent authority, or color of law, of any foreign nation.'" *Harbury v. Hayden*, 522 F.3d 413, 423 n.5 (D.C. Cir. 2008). Because Jawad makes no attempt to demonstrate that the individual-capacity defendants acted under color of foreign law, *see* Br. 53-56, the Court may affirm the district court's dismissal of Jawad's fourth cause of action for failure to state a claim. Jawad argues that "[t]he spirit of the TVPA cannot be read to exclude the individual Defendants from liability." Br. 54. But Jawad's divination of the spirit of the TVPA, of course, cannot trump the statute's unambiguous language or this Court's authoritative interpretation of the statutory text.

Jawad's contention that the TVPA "is unconstitutional" (Br. 55) is plainly without merit. Nothing in the Constitution supports Jawad's theory that Congress, in deciding to extend a damages remedy for the conduct of officials acting under color of foreign law, was required to extend a damages remedy against those who act under domestic authority. And even if the claim had some force, the district court could not simply rewrite the statute to add a remedy that is not there. See *Al Bahlul v. United States*, 767 F.3d 1, 17 (D.C. Cir. 2014) ("[A] court cannot 'rewrite a law to conform it to constitutional requirements, for doing so would constitute a serious invasion of the legislative domain.'" (quoting *United States v. Stevens*, 559 U.S. 460, 481 (2010))).

IV. JAWAD MAY NOT PURSUE HIS FIFTH AND SIXTH CLAIMS UNDER *BIVENS*

Finally, the Court may affirm the district court's dismissal of Jawad's fifth and six claims because special factors counsel against judicial recognition of a cause of action under *Bivens*, and the individual-capacity defendants are entitled to qualified immunity from those claims.

A. Special Factors Counsel Against Recognition of a *Bivens* Remedy

It is well established in this Circuit that special factors preclude the judicial recognition of *Bivens* claims against U.S. officials by individuals formerly detained in Afghanistan and Guantanamo. In cases involving legally indistinguishable allegations of abuse by U.S. officials of Afghan and Guantanamo detainees, this Court has held that allowing *Bivens* claims to proceed could interfere with the United States' significant national-security and foreign-policy interests, which are special factors precluding recognition of such claims. *Ali v. Rumsfeld*, 649 F.3d 762, 765-66, 773-74 (D.C. Cir. 2011) (Afghanistan); *Allaithi*, 753 F.3d at 1332, 1334 (Guantanamo); *Rasul v. Myers*, 563 F.3d 527, 532 n.5 (D.C. Cir. 2009) (Guantanamo); *see Rasul*, 512 F.3d at 649-51 (recounting alleged abuse). Thus, the district court was plainly correct to conclude that Jawad's *Bivens* "arguments are squarely foreclosed by Circuit precedent." JA 110.

Jawad largely ignores this precedent; he instead reiterates the very arguments that this Court previously considered and rejected. Br. 44-50. The only new arguments Jawad makes lack any merit. Jawad appears to

suggest that his alleged juvenile status at the time of his capture, and the government's decision not to oppose the habeas writ in his case, vitiate the special factors this Court has recognized. Br. 44, 46-47. But Jawad provides no explanation for why his alleged juvenile status or release is legally relevant to the special factors-inquiry. *Cf. Rasul*, 563 F.3d at 530 & n.2 (description of events making clear that Guantanamo detainees had been released years before the Court considered detainees' *Bivens* claims); *id*. at 532 n.5 (affirming dismissal of *Bivens* claims on special-factor grounds). Jawad also appears to argue that three international agreements to which the United States is a party require the Court to create a damages action to remedy the alleged violation of his constitutional rights. Br. 48. But Jawad fails to explain how the United States' international obligations are relevant to the distinct question of whether courts should create a remedy for alleged violations of domestic constitutional rights. In any event, none of the conventions on which Jawad relies creates judicially enforceable law.[8]

[8] *Sosa v. Alvarez-Machain*, 542 U.S. 692, 735 (2004) ("[T]he United States ratified the [International Covenant on Civil and Political Rights] on

Accordingly, it is up to Congress, not the judiciary, to make any obligations under the conventions enforceable in U.S. courts. *See Medellín*, 552 U.S. at 522 ("Congress knows how to accord domestic effect to international obligations when it desires such a result.").

B. The Individual-Capacity Defendants Enjoy Qualified Immunity for Jawad's *Bivens* Claims

"The doctrine of qualified immunity shields government officials from civil liability to the extent their alleged misconduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Rasul*, 563 F.3d at 529 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Jawad contends that his alleged

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the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts."); *Omar v. McHugh*, 646 F.3d 13, 17 (D.C. Cir. 2011) (same for Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment); Optional Protocol art. 6(3), S. Treaty Doc. No. 106-37 (requiring state parties to take "all feasible measures" to demobilize child soldiers in their jurisdictions and, "when necessary" to provide "all appropriate assistance" for their recovery and reintegration); *see generally Medellín v. Texas*, 552 U.S. 491, 516 (2008) ("The point of a non-self-executing treaty is that it addresses itself to the political, *not* the judicial department." (quotation marks omitted)).

abuse—which occurred between his initial detention by U.S. officials in Afghanistan in December 2002 and his release from Guantanamo in 2009—violated his rights under the Fifth and Eighth Amendments. JA 25-37; 42-44. In *Rasul*, this Court recognized that, as of the *Boumediene* decision in June 2008, the Supreme Court had "never held that noncitizens detained by our Government in territory over which another country maintains *de jure* sovereignty have any rights under our Constitution." 563 F.3d at 530 (quoting *Boumediene*, 553 U.S. at 770). There was, moreover, significant authority supporting the proposition that such aliens lacked any constitutional rights. *Id*. at 531-32. Because "there was no authority for—and ample authority against—plaintiffs' asserted rights at the time of the alleged misconduct," this Court held that the government officials were entitled to qualified immunity. *Id*. at 532.

Jawad's conclusory assertions (Br. 50 n.7) notwithstanding, Circuit precedent plainly shows that it was not clearly established that Jawad had any rights under the Fifth or Eighth Amendments when he was detained in Afghanistan in 2002. *See Ali*, 649 F.3d at 771 ("[I]t plainly was not clearly

established in 2004 that the Fifth and Eighth Amendments apply to aliens held in Iraq and Afghanistan."). And, at least until the Supreme Court issued its decision in *Boumediene*, it was not clearly established that aliens detained at Guantanamo enjoy *any* constitutional rights. *Rasul*, 563 F.3d at 530. It is unclear whether Jawad's complaint alleges any abuse between the time the Supreme Court decided *Boumediene* in June 2008 and his eventual release in 2009. But it would make no difference if it does. *Boumediene* held that the Suspension Clause applies to Guantanamo Bay and that, therefore, detainees held there by U.S. officials enjoy the privilege of habeas corpus. 553 U.S. at 771. But neither the Supreme Court nor this Court has ever held that aliens detained in such circumstances enjoy any other constitutional rights. Accordingly, during the time of Jawad's detention, it was not clearly established that Jawad had any rights under the Fifth or Eighth Amendments. The individual-capacity defendants therefore have qualified immunity from Jawad's *Bivens* claims.

CONCLUSION

The Court should affirm the district court's judgment dismissing Jawad's suit.

Respectfully submitted,

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February 10, 2016

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Palatino Linotype, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 11,246 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

s/ Lewis S. Yelin
LEWIS S. YELIN
Counsel for Appellees

CERTIFICATE OF SERVICE

I hereby certify that on February 10, 2016, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system, which, under the Court's rules, constitutes service on all parties registered with the CM/ECF system.

I further certify that I caused eight paper copies of this brief to be filed with the Court.

s/ Lewis S. Yelin
LEWIS S. YELIN
Counsel for Appellees

ADDENDUM

ADDENDUM CONTENTS

SUCCESSOR OFFICIALS

Pursuant to Federal Rule of Civil Procedure 25(d), Secretary of Defense Ashton B. Carter replaces Robert M. Gates and Donald H. Rumsfeld; Deputy Secretary of Defense Robert O. Work replaces Paul Wolfowitz and Gordon R. England; Secretary of the Navy Ray Mabus replaces Gordon R. England; Chairman of the Joint Chiefs of Staff Joseph Dunford replaces Richard Myers and Peter Pace; Commander, United States Southern Command Kurt W. Tidd replaces James T. Hill, Bantz J. Craddock, and James G. Stavridis; Commander, Joint Task Force Guantanamo Peter J. Clarke replaces Geoffrey D. Miller and Jay Hood; and Commander, Joint Detention Group, Guantanamo David E. Heath replaces Nelson Cannon as official-capacity defendants in the suit.

The positions formerly held by Esteban Rodriguez and Daniel McNeill (Director, Joint Intelligence Group, Guantanamo, and Commander, Coalition Forces Afghanistan, respectively) no longer exist as such, but the duties of those positions have been absorbed by the current Joint Task Force – Guantanamo J2, Kathleen H. Hawk, and Commander,

Resolute Support Mission and United States Forces – Afghanistan, John F. Campbell, respectively. Finally, the positions formerly held by Gordon R. England (as Designated Civilian Official), Frank Sweigart (as Deputy Director, Office for the Administrative Review of Detained Enemy Combatants), and James M. McGarrah (as Director of the same office) no longer exist at all, and thus there are no successors.

SENATE REVISION AMENDMENT

Chapter catchline was changed by Senate amendment. See 80th Congress Senate Report No. 1559.

AMENDMENTS

1978—Pub. L. 95–598, title II, §250(b), Nov. 6, 1978, 92 Stat. 2672, directed the addition of item 2256 ''Habeas corpus from bankruptcy courts'', which amendment did not become effective pursuant to section 402(b) of Pub. L. 95–598, as amended, set out as an Effective Date note preceding section 101 of Title 11, Bankruptcy.

1966—Pub. L. 89–711, §3, Nov. 2, 1966, 80 Stat. 1106, substituted ''Federal courts'' for ''State Courts'' in item 2254.

§2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

(e)(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

(June 25, 1948, ch. 646, 62 Stat. 964; May 24, 1949, ch. 139, §112, 63 Stat. 105; Pub. L. 89–590, Sept. 19, 1966, 80 Stat. 811; Pub. L. 109–148, div. A, title X, §1005(e)(1), Dec. 30, 2005, 119 Stat. 2741; Pub. L. 109–163, div. A, title XIV, §1405(e)(1), Jan. 6, 2006, 119 Stat. 3477; Pub. L. 109–366, §7(a), Oct. 17, 2006, 120 Stat. 2635; Pub. L. 110–181, div. A, title X, §1063(f), Jan. 28, 2008, 122 Stat. 323.)

HISTORICAL AND REVISION NOTES

1948 ACT

Based on title 28, U.S.C., 1940 ed., §§451, 452, 453 (R.S. §§751, 752, 753; Mar. 3, 1911, ch. 231, §291, 36 Stat. 1167; Feb. 13, 1925, ch. 229, §6, 43 Stat. 940).

Section consolidates sections 451, 452 and 453 of title 28, U.S.C., 1940 ed., with changes in phraseology necessary to effect the consolidation.

Words ''for the purpose of an inquiry into the cause of restraint of liberty'' in section 452 of title 28, U.S.C., 1940 ed., were omitted as merely descriptive of the writ.

Subsection (b) was added to give statutory sanction to orderly and appropriate procedure. A circuit judge who unnecessarily entertains applications which should be addressed to the district court, thereby disqualifies himself to hear such matters on appeal and to that extent limits his usefulness as a judge of the court of appeals. The Supreme Court and Supreme Court Justices should not be burdened with applications for writs cognizable in the district courts.

1949 ACT

This section inserts commas in certain parts of the text of subsection (b) of section 2241 of title 28, U.S.C., for the purpose of proper punctuation.

REFERENCES IN TEXT

Section 1005(e) of the Detainee Treatment Act of 2005, referred to in subsec. (e)(2), is section 1005(e) of title X of div. A of Pub. L. 109–148, which is set out as a note under section 801 of Title 10, Armed Forces.

CONSTITUTIONALITY

For information regarding constitutionality of certain provisions of this section, as added and amended by section 1005(e)(1) of Pub. L. 109–148 and section 7(a) of Pub. L. 109–366, see Congressional Research Service, The Constitution of the United States of America: Analysis and Interpretation, Appendix 1, Acts of Congress Held Unconstitutional in Whole or in Part by the Supreme Court of the United States.

AMENDMENTS

2008—Subsec. (e). Pub. L. 110–181 amended directory language of Pub. L. 109–366, § 7(a). See 2006 Amendment note below.

2006—Subsec. (e). Pub. L. 109–366, § 7(a), as amended by Pub. L. 110–181, added subsec. (e) and struck out both former subsecs. (e) relating to jurisdiction to hear or consider action against United States or its agents relating to detention of alien by Department of Defense at Guantanamo Bay, Cuba.

Subsec. (e). Pub. L. 109–163 added subsec. (e), relating to section 1405 of the Detainee Treatment Act of 2005.

2005—Subsec. (e). Pub. L. 109–148 added subsec. (e), relating to section 1005 of the Detainee Treatment Act of 2005.

1966—Subsec. (d). Pub. L. 89–590 added subsec. (d).

1949—Subsec. (b). Act May 24, 1949, inserted commas after ''Supreme Court'' and ''any justice thereof''.

EFFECTIVE DATE OF 2006 AMENDMENT

Pub. L. 109–366, § 7(b), Oct. 17, 2006, 120 Stat. 2636, provided that: ''The amendment made by subsection (a) [amending this section] shall take effect on the date of the enactment of this Act [Oct. 17, 2006], and shall apply to all cases, without exception, pending on or after the date of the enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001.''

TREATY OBLIGATIONS NOT ESTABLISHING GROUNDS FOR CERTAIN CLAIMS

Pub. L. 109–366, § 5, Oct. 17, 2006, 120 Stat. 2631, provided that:

''(a) IN GENERAL.—No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States or its States or territories.

''(b) GENEVA CONVENTIONS DEFINED.—In this section, the term 'Geneva Conventions' means—

''(1) the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, done at Geneva August 12, 1949 (6 UST 3114);

''(2) the Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, done at Geneva August 12, 1949 (6 UST 3217);

''(3) the Convention Relative to the Treatment of Prisoners of War, done at Geneva August 12, 1949 (6 UST 3316); and

''(4) the Convention Relative to the Protection of Civilian Persons in Time of War, done at Geneva August 12, 1949 (6 UST 3516).''

§ 2242. Application

Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf.

It shall allege the facts concerning the applicant's commitment or detention, the name of the person who has custody over him and by virtue of what claim or authority, if known.

It may be amended or supplemented as provided in the rules of procedure applicable to civil actions.

If addressed to the Supreme Court, a justice thereof or a circuit judge it shall state the reasons for not making application to the district court of the district in which the applicant is held.

(June 25, 1948, ch. 646, 62 Stat. 965.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 454 (R.S. § 754).

Words ''or by someone acting in his behalf'' were added. This follows the actual practice of the courts, as set forth in *United States ex rel. Funaro v. Watchorn*, C.C. 1908, 164 F. 152; *Collins v. Traeger*, C.C.A. 1928, 27 F.2d 842, and cases cited.

The third paragraph is new. It was added to conform to existing practice as approved by judicial decisions. See *Dorsey v. Gill* (App.D.C.) 148 F.2d 857, 865, 866. See also *Holiday v. Johnston*, 61 S.Ct. 1015, 313 U.S. 342, 85 L.Ed. 1392.

Changes were made in phraseology.

§ 2243. Issuance of writ; return; hearing; decision

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

(June 25, 1948, ch. 646, 62 Stat. 965.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §§ 455, 456, 457, 458, 459, 460, and 461 (R.S. §§ 755–761).

Section consolidates sections 455–461 of title 28, U.S.C., 1940 ed.

The requirement for return within 3 days ''unless for good cause additional time, not exceeding 20 days is allowed'' in the second paragraph, was substituted for the provision of such section 455 which allowed 3 days for return if within 20 miles, 10 days if more than 20 but not more than 100 miles, and 20 days if more than 100 miles distant.

Words ''unless for good cause additional time is allowed'' in the fourth paragraph, were substituted for words ''unless the party petitioning requests a longer time'' in section 459 of title 28, U.S.C., 1940 ed.

The fifth paragraph providing for production of the body of the detained person at the hearing is in conformity with *Walker v. Johnston*, 1941, 61 S.Ct. 574, 312 U.S. 275, 85 L.Ed. 830.

Changes were made in phraseology.

§ 2244. Finality of determination

(a) No circuit or district judge shall be required to entertain an application for a writ of

tion 10 of Pub. L. 89–506, set out as a note under section 2672 of this title.

§ 2678. Attorney fees; penalty

No attorney shall charge, demand, receive, or collect for services rendered, fees in excess of 25 per centum of any judgment rendered pursuant to section 1346(b) of this title or any settlement made pursuant to section 2677 of this title, or in excess of 20 per centum of any award, compromise, or settlement made pursuant to section 2672 of this title.

Any attorney who charges, demands, receives, or collects for services rendered in connection with such claim any amount in excess of that allowed under this section, if recovery be had, shall be fined not more than $2,000 or imprisoned not more than one year, or both.

(June 25, 1948, ch. 646, 62 Stat. 984; Pub. L. 89–506, § 4, July 18, 1966, 80 Stat. 307.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 944 (Aug. 2, 1946, ch. 753, § 422, 60 Stat. 846).

Words "shall be guilty of a misdemeanor" and "shall, upon conviction thereof", in the second sentence, were omitted in conformity with revised title 18, U.S.C., Crimes and Criminal Procedure (H.R. 1600, 80th Cong.). See sections 1 and 2 of said revised title 18.

Changes were made in phraseology.

SENATE REVISION AMENDMENT

This section was renumbered "2677" by Senate amendment. See 80th Congress Senate Report No. 1559.

AMENDMENTS

1966—Pub. L. 89–506 raised the limitations on allowable attorneys fees from 10 to 20 percent for administrative settlements and from 20 to 25 percent for fees in cases after suit is filed and removed the requirement of agency or court allowance of the amount of attorneys fees.

EFFECTIVE DATE OF 1966 AMENDMENT

Amendment by Pub. L. 89–506 applicable to claims accruing six months or more after July 18, 1966, see section 10 of Pub. L. 89–506, set out as a note under section 2672 of this title.

§ 2679. Exclusiveness of remedy

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

(b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government—

(A) which is brought for a violation of the Constitution of the United States, or

(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d)(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States

in accordance with the provisions of Rule 4(d)(4)[1] of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.

(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this title, such a claim shall be deemed to be timely presented under section 2401(b) of this title if—

(A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and

(B) the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect.

(June 25, 1948, ch. 646, 62 Stat. 984; Pub. L. 87–258, § 1, Sept. 21, 1961, 75 Stat. 539; Pub. L. 89–506, § 5(a), July 18, 1966, 80 Stat. 307; Pub. L. 100–694, §§ 5, 6, Nov. 18, 1988, 102 Stat. 4564.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 945 (Aug. 2, 1946, ch. 753, § 423, 60 Stat. 846).

Changes were made in phraseology.

SENATE REVISION AMENDMENT

The catchline and text of this section were changed and the section was renumbered ''2678'' by Senate amendment. See 80th Congress Senate Report No. 1559.

REFERENCES IN TEXT

The Federal Rules of Civil Procedure, referred to in subsec. (d)(3), are set out in the Appendix to this title.

AMENDMENTS

1988—Subsec. (b). Pub. L. 100–694, § 5, amended subsec. (b) generally. Prior to amendment, subsec. (b) read as follows: ''The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property or personal injury or death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim.''

Subsec. (d). Pub. L. 100–694, § 6, amended subsec. (d) generally. Prior to amendment, subsec. (d) read as follows: ''Upon a certification by the Attorney General that the defendant employee was acting within the scope of his employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place wherein it is pending and the proceedings deemed a tort action brought against the United States under the provisions of this title and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (b) of this section is not available against the United States, the case shall be remanded to the State court.''

1966—Subsec. (b). Pub. L. 89–506 inserted reference to section 2672 of this title and substituted ''remedy'' for ''remedy by suit''.

1961—Pub. L. 87–258 designated existing provisions as subsec. (a) and added subsecs. (b) to (e).

EFFECTIVE DATE OF 1988 AMENDMENT

Pub. L. 100–694, § 8, Nov. 18, 1988, 102 Stat. 4565, provided that:

''(a) GENERAL RULE.—This Act and the amendments made by this Act [enacting section 831c–2 of Title 16, Conservation, amending this section and sections 2671 and 2674 of this title, and enacting provisions set out as notes under this section and section 2671 of this title] shall take effect on the date of the enactment of this Act [Nov. 18, 1988].

''(b) APPLICABILITY TO PROCEEDINGS.—The amendments made by this Act [amending this section and sections 2671 and 2674 of this title] shall apply to all claims, civil actions, and proceedings pending on, or filed on or after, the date of the enactment of this Act.

''(c) PENDING STATE PROCEEDINGS.—With respect to any civil action or proceeding pending in a State court to which the amendments made by this Act apply, and as to which the period for removal under section 2679(d) of title 28, United States Code (as amended by section 6 of this Act), has expired, the Attorney General shall have 60 days after the date of the enactment of this Act during which to seek removal under such section 2679(d).

''(d) CLAIMS ACCRUING BEFORE ENACTMENT.—With respect to any civil action or proceeding to which the amendments made by this Act apply in which the claim accrued before the date of the enactment of this Act, the period during which the claim shall be deemed to be timely presented under section 2679(d)(5) of title 28, United States Code (as amended by section 6 of this Act) shall be that period within which the claim could have been timely filed under applicable State law, but in no event shall such period exceed two years from the date of the enactment of this Act.''

EFFECTIVE DATE OF 1966 AMENDMENT

Amendment by Pub. L. 89–506 applicable to claims accruing six months or more after July 18, 1966, see section 10 of Pub. L. 89–506, set out as a note under section 2672 of this title.

EFFECTIVE DATE OF 1961 AMENDMENT

Pub. L. 87–258, § 2, Sept. 21, 1961, 75 Stat. 539, provided that: ''The amendments made by this Act [amending this section] shall be deemed to be in effect six months after the enactment hereof [Sept. 21, 1961] but any rights or liabilities then existing shall not be affected.''

§ 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation,

[1] So in original. Probably should be a reference to Rule 4(i).

Public Law 102-256
102d Congress

An Act

To carry out obligations of the United States under the United Nations Charter and other international agreements pertaining to the protection of human rights by establishing a civil action for recovery of damages from an individual who engages in torture or extrajudicial killing.

Mar. 12, 1992
[H.R. 2092]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Torture Victim Protection Act of 1991.
28 USC 1350 note.

SECTION 1. SHORT TITLE.

This Act may be cited as the "Torture Victim Protection Act of 1991".

28 USC 1350 note.

SEC. 2. ESTABLISHMENT OF CIVIL ACTION.

(a) LIABILITY.—An individual who, under actual or apparent authority, or color of law, of any foreign nation—

(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or

(2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

(b) EXHAUSTION OF REMEDIES.—A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.

(c) STATUTE OF LIMITATIONS.—No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose.

28 USC 1350 note.

SEC. 3. DEFINITIONS.

(a) EXTRAJUDICIAL KILLING.—For the purposes of this Act, the term "extrajudicial killing" means a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.

(b) TORTURE.—For the purposes of this Act—

(1) the term "torture" means any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind; and

(2) mental pain or suffering refers to prolonged mental harm caused by or resulting from—

(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

(B) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(C) the threat of imminent death; or

(D) the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

Approved March 12, 1992.

LEGISLATIVE HISTORY—H.R. 2092 (S. 313):

HOUSE REPORTS: No. 102-367, Pt. 1 (Comm. on the Judiciary).
SENATE REPORTS: No. 102-249 accompanying S. 313 (Comm. on the Judiciary).
CONGRESSIONAL RECORD:
Vol. 137 (1991): Nov. 25, considered and passed House.
Vol. 138 (1992): Mar. 3, considered and passed Senate.
WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 28 (1992):
Mar. 12, Presidential statement.